File No. A17-0033

STATE OF MINNESOTA
IN COURT OF APPEALS

Tiffini Flynn Forslund, et al.

Appellants,

vs.

State of Minnesota, et al.

Respondents.

BRIEF OF *AMICI CURIAE* Centro de Trabajadores Unidos en Lucha, ISAIAH, and TakeAction Minnesota

FISHMAN HAYGOOD, L.L.P.
James R. Swanson (LA #18455)
Alysson L. Mills (LA #32904)
Jess C. Stewart (LA #36282, PHV)
201 St. Charles Ave., Suite 4600
New Orleans, Louisiana 70170-4600
(504) 586-5252

BASSFORD REMELE
Lewis A. Remele, Jr. (MN #90724)
Kate L. Homolka (MN #395229)
100 S. 5th Street, Suite 1500
Minneapolis, Minnesota 55402-1254
(612) 333-3000

Nekima Levy-Pounds (MN #335101)
2901 Lyndale Ave. N.
Minneapolis, Minnesota 55411
(612) 210-3731

ATTORNEYS FOR APPELLANTS

OFFICE OF THE ATTORNEY
GENERAL, STATE OF MINNESOTA
Alethea M. Huyser (MN #389270)
Andrew Tweeten (MN #395190)
Jason Marisam (MN #398187)
Assistant Attorneys General

445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 757-1243 (Voice)
(651) 282-5832 (Fax)

ATTORNEYS FOR RESPONDENTS

Counsel for amici *appear on the following page*

FABYANSKE, WESTRA, HART
& THOMSON, P.A
Nathan R. Sellers
3333 South Seventh Street, Suite 2600
Minneapolis, MN 55402
(612) 359-7600
ATTORNEYS FOR ED ALLIES

SUBBARAMAN PLLC
Mahesha P. Subbaraman
222 S. 9th Street, Suite 1600
Minneapolis, MN 55402
(612) 315-9210
ATTORNEYS FOR FREEDOM FOUNDATION OF MINNESOTA

SIDLEY AUSTIN LLP
James D. Arden
Peter D. Kaufman
787 Seventh Ave.
New York, NY10022
(212) 839-5833

JOHN CAIRNS LAW, P.A.
John Cairns
2751 Hennepin Avenue, Box 280
Minneapolis, MN 55408
(612) 986-8532
ATTORNEYS FOR NATIONAL COUNCIL ON TEACHER QUALITY AND TNTP, INC.

EDUCATION MINNESOTA
Christina L. Ogata
Jess Anna Glover
Cedrick R. Frazier
41 Sherburne Avenue
St. Paul, MN 55103
(651) 767-1258
ATTORNEYS FOR EDUCATION MINNESOTA

AMERICAN FEDERATION OF TEACHERS, AFL-CIO
David J. Strom
Samuel J. Lieberman
555 New Jersey Ave. NW
Washington, D.C. 20001
(202) 393-7472

NATIONAL EDUCATION ASSOCIATION
Alice O'Brien
Emma Leheny
Eric A. Harrington
1201 16th Street NW
Washington, D.C. 20036
(202) 822-7018
ATTORNEYS FOR AMERICAN FEDERATION OF TEACHERS, AFL-CIO, AND NATIONAL EDUCATORS ASSOCIATION

ROGER J. ARONSON
P.O. Box 19350
Diamond Lake Station
Minneapolis, MN 55419
(612) 865-1459
ATTORNEY FOR MINNESOTA ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS

MILLER O'BRIEN JENSEN, P.A.
Timothy J. Louris
Canadian Pacific Plaza
120 S. Sixth Street, Suite 2400
Minneapolis, MN 55402
(612) 333-5831
ATTORNEY FOR CENTRO DE TRABAJADORES UNIDOS EN LUCHA, ISAIAH, AND TAKEACTION MINNESOTA

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STATEMENT OF AMICI CURIAE[1]

Centro de Trabajadores Unidos en Lucha ("CTUL"), ISAIAH, and TakeAction Minnesota ("TakeAction") hereby submit this *amici curiae* brief in support of Respondent State of Minnesota's position that the Court should affirm the district court's dismissal of Plaintiffs' Complaint with prejudice.

CTUL is a worker-led advocacy organization dedicated to building the power and leadership of low-wage workers. CTUL began as a program of the Workers Interfaith Network, which was created to assist low-wage workers with various workplace issues. CTUL, now an independent organization, partners directly with workers through leadership development and direct action in order to educate workers about their workplace rights, and how to exercise those rights to win change in their workplaces. In building a movement for economic justice, CTUL works to level the playing field between worker and corporate interests.

ISAIAH is an organization of congregations, clergy, and people of faith acting collectively towards racial and economic equity in the state of Minnesota. ISAIAH has advocated for years on issues of education equity at the school district and state level. ISAIAH campaigns have included advocacy for adequate and equitable funding of public education, ending the school to prison pipeline, and increasing teacher diversity.

[1] Pursuant to Minn. R. Civ. App. P. 129.03, this *amici curiae* brief was authored entirely by the undersigned counsel for *amici* Centro de Trabajadores Unidos en Lucha, ISAIAH, and TakeAction Minnesota. No other person or entity made any monetary contribution to the preparation or submission of this brief.

TakeAction is a statewide network of individual and organizational members working collaboratively to raise the voices of Minnesotans in their own communities to advance social, racial and economic justice. TakeAction's mission seeks to connect and lead a statewide, multi-racial alignment that challenges corporate power, structural racism, and gender oppression in order to win governing power and achieve a truly democratic and equitable society. TakeAction's partnership with organized labor, and educators in particular, has included campaigns to pass referenda to adequately fund Minnesota's schools, as well as other political and policy initiatives.

SUMMARY OF ARGUMENT

Appellants have failed to support their claims that Minnesota's teacher tenure and continuing contract statutes, Minn. Stat. §§ 122A.40–.41, which allow school districts to terminate teachers for various reasons (including inefficiency in teaching) and provide teachers with certain due process rights, violate the Minnesota Constitution by forcing districts to retain "ineffective teachers."

First, the Court lacks subject matter jurisdiction over Appellants claims pursuant to the political question doctrine because Appellants' lawsuit is little more than an invitation for the Court to inappropriately engage in legislative policymaking with regard to Minnesota's education system. As the district court correctly ruled, "[a]lmost 140 years of state case law stands for the proposition that the appropriate avenue to address [education] policy is through the legislative process rather than the courts." Appellants' Addendum p. 75.

Second, contrary to Appellants' claims that the teacher tenure and continuing contract statutes impede student education, Minnesota courts have long-recognized that teacher due process rights are critical to the Minnesota education system, as they allow teachers to confront controversial, but necessary, subject matter and advocate on behalf of students and communities without fear of retaliation. *See McSherry v. City of St. Paul*, 277 N.W. 541, 544 (Minn. 1938) (noting that the teacher tenure statutes were "enacted for the benefit and advantage of the school system by providing such machinery as would tend to minimize the part that malice, political or partisan trends, or caprice might play.").

And finally, while the *amici* could hardly attempt to articulate the full scope of factors that result in racial and socioeconomic disparities in education, Appellants' attempts to lay the blame entirely on teacher due process rights warrants, at the very least, consideration of the long-term underfunding and staffing shortages that have plagued Minnesota schools for many years. Appellants cannot reasonably expect to resolve racial and socioeconomic disparities in education through a specious judicial challenge to teacher tenure rights while ignoring critical school funding and staffing issues that have, over many years, resulted in demonstrably harmful consequences for Appellants and other students throughout the state.

For all these reasons, Centro de Trabajadores Unidos en Lucha, TakeAction Minnesota, and ISAIAH therefore jointly file this *amici curiae* brief in support of Respondent State of Minnesota.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED THAT IT LACKED SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS PURSUANT TO THE POLITICAL QUESTION DOCTRINE.

Article XIII of the Minnesota Constitution provides that "it is the duty of the legislature to establish a general and uniform system of public schools" and to provide financially "to secure a thorough and efficient system of public schools . . . ." Minn. Const. art. XIII, § 1. Minnesota has long recognized that the "method by which these objectives were to be accomplished was ***left to legislative determination***." *Board of Educ. v. Erickson*, 295 N.W. 302, 304 (Minn. 1940) (emphasis added).

In exercising its Constitutional authority to articulate educational policy, the legislature has enacted statutes, challenged here, that expressly allow school districts to terminate the employment of any teacher for cause, including inefficient teaching. Minn. Stat. §§ 122A.40, Subds. 9 & 13; 122A.41, Subd. 6. At the same time, the legislature has determined that, as a matter of educational policy, those statutes should also provide teachers with procedural due process protections as a bulwark against arbitrary or illegitimate terminations and layoffs. *See* Minn. Stat. §§ 122A.40–.41; *see also McSherry v. City of St. Paul*, 277 N.W. 541, 543 (Minn. 1938) (explaining that when the tenure laws were developed "[i]t was thought that for the good of the schools and the general public the profession [of teaching] should be made independent of personal or political influence, and made free from the malignant power of spoils and patronage.").

Appellants in this case challenge the wisdom of those statutes by misleadingly claiming that the statutory due process protections provided to teachers result in

"ironclad" job security for "ineffective" teachers, which in turn purportedly results in an increased risk that they will be taught by "ineffective" teachers in violation of the state Constitution. *See Appellant's Br. 37* ("Plaintiffs allege that the Challenged Statutes are unconstitutional because they provide ***unqualified protection*** to chronically ineffective teachers who universally enjoy ***ironclad job security***…") (emphasis added); *but see* Minn. Stat. §§ Minn. Stat. §§ 122A.40, Subds. 9 & 13; 122A.41, Subd. 6 (providing that districts may terminate teachers for several reasons, including inadequate teaching performance); Am. Compl. ¶ 119 (citing Alejandra Matos, *Minneapolis' worst teachers are in the poorest schools, data show*, MINNEAPOLIS STAR TRIBUNE (Jan. 28, 2015), which reported that the Minneapolis School District terminated approximately 200 teachers in the 2013–14 school year alone).

Even if teachers did "universally enjoy ironclad job security" as a result of the challenged statutes (they don't), Appellants' judicial efforts to abrogate those statutes are precluded by the political question doctrine. The law has been well-settled for over a century that where claims present nonjusticiable political questions, the court lacks subject matter jurisdiction. *See, e.g.*, In re *McConaughy*, 119 N.W. 408, 417 (Minn. 1909). Thus, while courts may consider whether the legislature has acted within the scope of its Constitutional power when it enshrines educational policy into statute, the political question doctrine prevents the judiciary from passing judgment on the *wisdom* of those statutory educational policies.

Minnesota courts in several prior cases have determined that challenges to educational statutes and policies fall outside the scope of the court's adjudication powers

pursuant to the political question doctrine. *See, e.g.*, *Skeen v. State*, 505 N.W.2d 299, 318 (Minn. 1993) (dismissing challenge to educational funding statutes as an encroachment on legislative policy-making); *Board of Educ. v. Erickson*, 295 N.W. 302, 304 (Minn. 1940) (dismissing challenge to statute requiring expansion of educational subjects on political question grounds); *Alsides v. Brown Inst., Ltd*., 592 N.W.2d 468, 473 (Minn. Ct. App. 1999) (dismissing claims for educational malpractice that would require courts to wade into issues of pedagogical adequacy).

Indeed, Minnesota courts are not alone in ruling that judicial challenges to educational policies and statutes are precluded by the political question doctrine. In *Alsides* the court noted that throughout the country "the majority of courts that have addressed the issue have rejected claims that attack the general quality of education provided to students." 592 N.W.2d at 472, n.2 (collecting numerous cases).

And much more recently, in March 2017 the Minnesota Court of Appeals expressly ruled that a claim challenging the quality of a student's education presents a nonjusticiable political question. *Cruz-Guzman v. State of Minnesota*, Case No. A16-1265 (Minn. Ct. App. March 13, 2017). In so holding, the Court in *Cruz-Guzman* cited precedent from 1878, stating:

> In the absence of any constitutional prohibition, the whole matter of the establishment of public schools, the course of instruction to be pursued therein, how they shall be supported, upon what terms and conditions people shall be permitted to participate in the benefits they afford—***in fine, all matters pertaining to their government and administration***—come clearly within the range of proper legislative authority.

Id., *quoting Curryer v. Merrill*, 25 Minn. 1, (Minn. 1878) (emphasis added). The *Cruz-Guzman* court thus pronounced that "[t]his Court has therefore refused to engage in educational-policy determinations." *Id.*

Appellants, for their part, attempt to distinguish *Cruz-Guzman* on the basis that the *Cruz-Guzman* plaintiffs sought to use the Education Clause as a "sword" to invalidate educational policies that they alleged infringed on their right to an education of a particular quality, while Appellants in the instant matter use the Education Clause as a "shield" to invalidate educational statutes that they allege infringe on their right to an education of a particular quality. *See Appellants' Br. p. 29*. For purposes of the political question doctrine as applied to the facts of this case, Appellants' "sword/shield" distinction is clearly one without a difference. Appellants here, as in *Cruz-Guzman*, are asking the Court wade into the legislative arena of education policy because they believe that the state would be better off without the current statutory tenure regime, and the legislature has to-date refused to eliminate or modify those statutes to Appellants' liking.[2]

The district court in this case correctly determined that, just like in *Cruz-Guzman*, "Plaintiffs' concerns in this case relate to the wisdom of the legislative policy," and "[a]lmost 140 years of state case law stands for the proposition that the appropriate avenue to address that policy is through the legislative process rather than the courts."

[2] Tellingly, shortly after the Complaint was filed in this case, lead plaintiff Tiffani Flynn Forslund apparently reported to the Star Tribune that she "decided to join the lawsuit after watching the Legislature fail to pass laws that prioritize effective teaching over experience." Alejandra Matos, *Lawsuit Accuses Minnesota of Protecting Bad Teachers At Expense of Students*, STAR TRIBUNE (April 14, 2016), *available at* *http://www.startribune.com/suit-says-minnesota-protects-bad-teachers-at-expense-of-students/375609941/*.

Appellants' Addendum p. 75. Thus, because the substance of the challenged statutes is founded on an educational policy determination of the legislature, this Court lacks jurisdiction to invalidate those statutes.

II. CONTRARY TO APPELLANTS' CLAIMS, MINNESOTA'S TEACHER TENURE STATUTES FURTHER THE INTERESTS OF STUDENTS AND COMMUNITIES BY ENSURING THAT EDUCATORS MAY CARRY OUT THEIR CRITICAL SOCIETAL FUNCTION WITHOUT FEAR OF RETALIATION.

In the 1938 *McSherry v. St. Paul* case, the Minnesota Supreme Court articulated that "every citizen knows and recognizes, not only as a matter of history but also as a matter of personal experience, the great importance our schools have played and are playing in the furtherance of good citizenship by affording, generally and to all our youth, opportunity to gain an education." 277 N.W at 544. Toward that end, the Court went on to note that teacher tenure statutes were "enacted for the benefit and advantage of the school system by providing such machinery as would tend to minimize the part that malice, political or partisan trends, or caprice might play." *Id.*. Several decades later, the Minnesota Supreme Court reiterated these principles in *Frye v. Independent School District No. 625*: "Teachers, whose primary task is to impart knowledge to students through personal interaction, are given the security of tenure to assure their academic freedom and to protect them from arbitrary demotions and discharges that are unrelated to their ability to perform their prescribed duties." 494 N.W.2d 466, 467 (Minn. 1992).

"It cannot be disputed that a necessary component of any education is learning to think critically about offensive ideas—without that ability one can do little to respond to them." *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1031 (9th Cir. 1998);

see also Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) ("It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers . . . cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them."); *McCarthy v. Fletcher* 207 Cal. App. 3d 130, 140 (1989) (noting "two essential functions of a school board, exposing young minds to the clash of ideas in the free marketplace and the need to provide our youth with a solid foundation of basic, moral values").

In order to develop critical thinking skills in students, teachers "guide students through the difficult process of becoming educated, . . . help[ing] them learn how to discriminate between good concepts and bad, to benefit from the errors society has made in the past, [and] to improve their minds and characters." *Monteiro*, 158 F.3d at 1032. Given the nature of the job, it should be self-evident that teachers will inevitably need to engage students, and sometimes the broader community, with ideas that some may consider controversial or even offensive. Yet teachers can hardly be expected to fully engage with students and communities on important, albeit controversial, subjects where their livelihood lacks meaningful due process protection.

History is replete with examples of teachers facing termination in retaliation for their advocacy and education of students on matters considered controversial by school officials. For example, in the Eighth Circuit case of *McGee v. South Pemiscot School District*, high school teacher John McGee filed suit against his school district employer for refusing to renew his teaching contract after he publicly criticized the district's

decision to eliminate a popular junior-high track program. 712 F.2d 339 (8th Cir. 1983). Prior to his criticism of the district, McGee—who had no tenure or statutory due process rights—was an unquestionably respected and well-qualified educator. As the court noted, "[a]s late as March 1980, a month before his contract came up for renewal, there was every indication that he would be teaching at South Pemiscot the following school year." *Id.* at 341. However, after publishing a letter to the editor of the local newspaper in which McGee criticized the district and set forth several reasons for supporting the junior-high track program, the continuation of the track program became an issue in the local school board campaign, at which point several school board officers (who wanted to terminate the track program) voted against renewing McGee's teaching contract. *Id.*

Similarly, in the Sixth Circuit case of *Evans-Marshall v. Board of Education of Tipp City Exempted Vill. School District*, a second-year untenured high school English teacher was dismissed after she taught a unit on government censorship, and assigned her students to read *Siddhartha* by Nobel Prize winner Herman Hesse. 624 F.3d 332 (6th Cir. 2010). Following that assignment, some parents complained to the school board about the book because of its "explicit language and sexual themes." *Id.* at 335. In response to the complaints, notwithstanding that the school board itself had purchased the book for the school, Evans-Marshall's supervisor told her she was "on the hot seat" and she received her first negative performance review. *Id.* at 335, 340. Finally, at the end of the year and in the face of community pressure over the assignment, the school board voted unanimously to not renew her contract. *Id.* at 336.

Conversely, tenure and statutory due process serve the obvious societal function of protecting teachers whose work results in controversy, as occurred in *Kramer v. New York City Board of Education*, 715 F. Supp. 2d 335 (E.D.N.Y. 2010). In that case, tenured middle school teacher Faith Kramer—who, by the way, had received the highest possible rating every year since she began teaching—was assigned to teach her students about HIV/AIDS awareness. *Id.* at 342–43. Despite the fact that Kramer had taught that class successfully for 15 years in conformance with state-mandated lesson plans, parents complained after learning that Kramer had asked her students to brainstorm words they had "heard or used when speaking about sexual acts, body parts, or bodily fluids." *Id.* Kramer's purpose in this assignment was to use the resulting list of colloquial or "vulgar" words as means of teaching more appropriate and accurate terms, just as she had done for years. *Id.* at 344–47. As a result of complaints from parents, however, the school board ultimately denied Kramer a satisfactory teacher rating, removed her from the classroom for the remainder of the year, and refused to provide her with other work. *Id.* at 347–48. But because of tenure rights, Kramer did not ultimately lose her job. Instead, after exercising her statutory due process rights, Kramer eventually returned to the classroom when the district properly declined to initiate dismissal proceedings. *Id.* at 347.

Outside the context of curriculum, teachers are often the frontline voice of the community on educational policy issues, and teacher tenure statutes provide critical job protections for educators who articulate views that may conflict with school board officials and administrators. *See, e.g., Pickering v. Bd. of Educ. of Township High Sch. Dist. 20*5, 391 U.S. 563, 566 (1968) (teacher dismissed after publishing "letter to the

editor" criticizing School Board's "bond issue proposals and its subsequent allocation of financial resources between the school's educational and athletic programs"); *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1132–35 (10th Cir. 2010) (reversing summary judgment for district on school speech pathologist's Rehabilitation Act claim that she was reduced to part time status because of her complaints regarding insufficient special education services); *McGee*, 712 F.2d at 339 (reversing district court's granting of judgment *non obstante veredicto* and finding that high school teacher John McGee was unjustly fired for publicly criticizing the school district for eliminating a popular junior-high track program); *Bernasconi v. Tempe Elem. Sch. Dist. No. 3*, 548 F.2d 857, 861–62 (9th Cir. 1977) (holding that plaintiff, a special education counselor, was transferred at least in part because she complained that English language learners were being wrongly placed in special education classes and urged their parents to consult the Legal Aid Society, and remanding for assessment of mixed-motive defense).

Effective teaching inherently involves presenting controversial material, rapidly adapting to individual students or classroom situations, encouraging critical thinking, and advocating on behalf of students and communities—all of which may subject educators to unjust workplace retaliation. The Minnesota legislature crafted the statutes at issue in this case specifically to protect teachers from such retaliation. *See* Christina L. Clark and Harley M. Ogata, *Are Minnesota Teacher Termination Procedures Progressive: How Much Process Is Due?*, 33 WM. MITCHELL L. REV. 339, 343 (2006) (noting that Minnesota and other states originally adopted tenure statutes "to rid the public schools of cronyism, nepotism and use of spoils systems.").

Without the due process protections of tenure and seniority, teachers will be less likely to present important but controversial curricular material. They will be less likely to adopt effective teaching methods out of fear that parents or school officials object. They will hesitate to advocate on behalf of vulnerable students or school policies that otherwise lack a voice. In short, students and communities will suffer. The Minnesota Supreme Court recognized long ago that the state tenure statutes at issue in this case are "wise legislation, promotive of the best interests, not only of teachers affected, but of the schools as well." *Oxman v. ISD Duluth*, 227 N.W. 351 (Minn. 1929). The Court should thus reject Appellants' ill-conceived invitation to usurp the Legislature's Constitutional authority and second-guess the wisdom of that legislation.

III. A HIGH QUALITY EDUCATION DEPENDS FIRST AND FOREMOST ON ADEQUATE SCHOOL FUNDING AND STAFFING, WHICH MINNESOTA CURRENTLY FAILS TO PROVIDE.

In their Amended Complaint, Appellants point out the essentially non-controversial fact that "[i]f provided their rightful uniform and thorough education, children of all socioeconomic, racial, and ethnic backgrounds are capable of learning and achieving academic benchmarks." Amend. Compl. ¶ 12. But according to the Amended Complaint, Minnesota school districts are currently plagued by socioeconomic, race, and ethnic disparities in educational outcomes. *See generally* Amend. Compl. "In sum," Appellants state, "Minnesota's public schools are falling well short of providing all Minnesota children their fundamental right to a uniform and thorough education." *Id.* ¶ 15. Appellants' lawsuit then proceeds to place the blame for all of these purported evils

squarely, and apparently solely, on the shoulders of Minnesota teacher tenure and seniority statutes.

There is deep disingenuousness in Appellants' attempt to posture this litigation as in the best interest of Minnesota's students. The Amended Complaint is founded on the wholly unsupported presumption that racial and class disparities in education are *caused* by teacher due process rights (and thus will, apparently, be magically resolved with the abrogation of such rights), all the while Appellants' 75-page Amended Complaint completely ignores the critical underfunding and staffing issues that have plagued Minnesota school districts for years.

Currently, according to the Minnesota Department of Education, the general education revenue program is the primary source of operating funds for schools throughout the state. *See General Education*, MINN. DEPT. OF ED. (2017), *available at* http://education.state. mn.us/MDE/dse/schfin/GenEd/. For fiscal year 2017 (which encompasses the current 2016–17 school year), the amount of basic general education revenue provided by the state per pupil is $6,067. *See* Minn. Stat. § 126C.10, Subd. 2. And while the legislature has increased general education revenue funding modestly in recent years,[3] Minnesota school districts continue to grapple with the effects of long-term real (*i.e.*, inflation-adjusted) decline in basic revenue funding. State education funding

[3] Basic revenue funding per pupil has increased in nominal dollars as follows since FY 2015:

- 2015: $5,831
- 2016: $5,948
- 2017: $6,067

See Minn. Stat. § 126C.10, Subd. 2.

statistics show that from 2003 to 2014, the state formula allowance (in constant 2017 dollars) for basic school revenue fell from $6,949 to $5,504—*a decline of 20.8%*. *See Basic School Revenue Hasn't Kept Up With Inflation*, NORTH STAR POLICY INSTITUTE (April 18, 2017), *available at* *http://northstarpolicy.org/basic-school-revenue-hasnt-kept-inflation/*. And even with the more recent increases in general education funding from 2015 to 2017, those increases were sufficient to recoup only 39% of the real decline that occurred between 2003 and 2014, and recent education funding proposals by the governor and legislature "do nothing to reduce the real decline in the allowance since 2003." *Id.*

As a result of these funding issues, the St. Paul School District faced a $15.1 million budget deficit during the 2016–17 school year, and has projected a deficit of ***$27 million*** for the 2017–18 school year. Anthony Lonetree, *St. Paul schools facing $27 million budget gap*, STAR TRIBUNE (March 7, 2017) *available at* *http://www.startribune.com/st-paul-schools-facing-27-million-budget-gap/415630174/*. Similarly, the Minneapolis School District has projected a ***$28 million*** budget gap for the coming 2017–18 school year, which has resulted in the recent announcement that the district intends to cut *hundreds* of full-time staff positions. Solvejg Wastvedt, *Minneapolis schools project cutting hundreds of positions, but numbers are preliminary*, MPR NEWS (April 28, 2017) *available at* *https://www.mprnews.org/story/2017/04/28/mpls-schools-project-cutting-hundreds-positions-but-numbers-preliminary*.

The long-term lack of adequate funding to attract and retain qualified teachers has resulted in a well-documented and widespread teacher shortage, and a recent 2017 teacher supply-and-demand study found that Minnesota's school districts have struggled greatly in recent years to fill teacher positions in various fields of science, language, math, and special education. *See 2017 Report of Teacher Supply and Demand in Minnesota's Public Schools* 32, MINN. DEPT. OF ED. (2017) (hereinafter "Supply and Demand"), *available at* *http://www.gomn.com/wp-content/uploads/2017/02/2017-Teacher-Supply-and-Demand-Corrected.pdf*. In that study, hiring officials at district and charter schools reported that the two largest barriers to attracting and retaining qualified teachers are (1) a competitive job market, and (2) low teacher salary. *See id.* at 31.

Minnesota school districts can hardly expect to attract, train, and *retain* qualified teachers where real funding for teacher salaries continues to fall year after year. *See* Solvejg Wastvedt, *Minnesota Teacher Shortage: Real but Complicated*, MPR NEWS (March 27, 2017) ("Bigger salaries at the start would be a great way to attract and retain young, qualified teachers. But that's not likely to happen any time soon, especially in small rural districts."); *see also* Motoko Rich, *Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional)*, THE NEW YORK TIMES (Aug. 9, 2015) https://www.nytimes.com/2015/08/10/us/teacher-shortages-spur-a-nationwide-hiring-scramble-credentials-optional.html?_r=0 ("Across the country, districts are struggling with shortages of teachers, particularly in math, science and special education — a result of the layoffs of the recession years combined with an improving economy in which fewer people are training to be teachers.").

Of course, where teachers become scarce, class sizes increase, and increased class size has been demonstrably shown to have a negative impact on student achievement. *See, e.g.*, Achilles, et al., *Class-size Policy: The Star Experiment and Related Class-Size Studies*, NCPEA POLICY BRIEF 2 (2012) (finding that small class sizes in early elementary school provided short and long-term benefits for students, with increased benefits for students who were economically disadvantaged, male, or minority); Diane Whitmore Schanzenbach, *Does Class Size Matter?*, NATIONAL EDUCATION POLICY CENTER POLICY BRIEF (2014) *available at* *http:// nepc.colorado.edu/publication/does-class-size-matter* (summarizing the academic literature on the impact of class size and finding impact on a variety of student outcomes, including student test scores and raising the achievement levels of economically disadvantaged and minority children). It is unsurprising that students in smaller classes are more engaged and suffer from less disruption; small classes provide increased opportunities for inter-personal interactions between teachers and students. Finn, Pannozzo & Achilles, *The Why's of Class Size: Student Behavior in Small Classes*, REVIEW OF EDUCATIONAL RESEARCH 351 (Fall 2003) *available at* http://rer.sagepub.com/content/73/3/321.full.pdf+html. However, Minnesota schools cannot expect to maintain adequately low class sizes where they lack funding to attract and retain teachers.

Another side-effect of Minnesota's teacher shortage is that many districts are forced to seek personnel variances and other special permissions from the Board of Teaching, which allow districts to make up for teacher shortages by assigning classes to teachers or other "community experts" who are not actually licensed to teach that

particular subject. During the 2015–16 school year alone, Minnesota school districts requested 13,512 Board of Teaching special permissions, and the number of special permissions sought by districts has increased every school year since at least 2011. *See* Supply and Demand, p. 37. As a result, many students may find themselves in classrooms led by individuals who have little or no training in teaching the subject matter of the course, and this problem may be especially pervasive in outstate and smaller districts that have the most difficult time attracting licensed teachers. *See Minnesota Teacher Shortage: Real But Complicated*, MPR NEWS (March 27, 2017) ("Special permission requests … have shot up in recent years as districts scramble to staff classrooms.").

Minnesota is also failing its students who need the support of counselors and other non-teaching staff. For the last several years, Minnesota's student-to-counselor ratio has ranked at or near the bottom of all states, with just one counselor for every 792 students. *See* Editorial Board, *Minnesota has critical need for school counselors*, STAR TRIBUNE (January 29, 2015), *available at* *http://www. startribune.com/minnesota-has-critical-need-for-school-counselors/290141021/*; Erin Heinrichs, *What education issues are on tap for Minnesota's 2016 legislative session?*, MINNPOST (March 3, 2016), *available at* https://www.minnpost.com/education/2016/03/what-education-issues-are-tap-minnesotas-2016-legislative-session ("Another education expense that's been surfacing in multiple circles involves the critical need to address the student-support-services gap that currently exists in Minnesota, which currently ranks at the bottom of the barrel, nationally, with a just one counselor for every 792 students.").

While many states mandate specific student-to-counselor ratios, Minnesota has to-date refused to enact any such mandate, and Governor Dayton has cited the shortage of school counselors as a "key weakness in public education in Minnesota." *See Minnesota has critical need for school counselors*, STAR TRIBUNE (January 29, 2015) ("Because of Minnesota's strong emphasis on local control when it comes to schools, there isn't much legislative appetite for imposing a statewide [school counselor] requirement."). In fact, while the American School Counselors Association recommends that schools employ at least one counselor for every 250 students, the national average ratio is 491:1 and studies have found that low-income and first-generation students are most affected by this deficiency in the education system. James Murphey, *The Undervaluing of School Counselors*, THE ATLANTIC (Sept. 16, 2016) ("The problem, as documented in a 2012 report, is that many high-school counselors are overburdened by huge caseloads, especially at schools where a majority of children are first-generation and low-income students.").

In sum, despite these indisputable statistics regarding long-term school underfunding and staffing shortages in Minnesota, Appellants ask the Court to conclude that *teacher due process rights* alone are the direct and proximate cause of their alleged inability to obtain an adequate education. To be sure, it should go without saying that educational policy is complex and the success or failure of particular students, or groups of students, simply cannot be traced to a single determinative factor—***which is precisely the point***, and perhaps the most obvious reason why Appellants' lawsuit fails. To the extent Appellants ever find themselves in a classroom with a demonstrably "ineffective"

teacher, filing a lawsuit attacking that teacher's due process rights while ignoring school funding and the myriad other causes of racial and socioeconomic disparity in education (which simply cannot be addressed within the word-limit rules for *amicus* briefs)—makes little sense as a remedy. Elimination of teacher tenure rights does nothing to improve school underfunding, does nothing to lower class sizes, won't result in school districts hiring more counselors and staff, won't provide improvements to school facilities, and certainly won't incentivize talented would-be teachers to enter the profession.

To the extent Appellants actually seek to improve education for Minnesota students, they would do well to divert their resources away from anti-teacher lawsuits and into pro-student advocacy for increased school funding so that districts can afford to attract and *retain* highly qualified educators.[4] Because while there is absolutely no evidence to suggest that elimination of Minnesota's teacher tenure statutes will result in a higher quality education for Appellants, there ***are*** several studies that have concluded that increased education funding dramatically increases school performance. *See, e.g.*, Joydeep Roy, *Impact of School Finance Reform on Resource Equalization and Academic Performance: Evidence From Michigan*, ED. FIN. & POLICY 137 (2011) ("Proposal A was quite successful in reducing interdistrict spending disparities. There was also a

[4] In fact, Tom Rademacher, a recently laid-off teacher from Robbinsdale Area Schools (and who also happens to be Minnesota's 2014 Teacher of the Year), has publicly stated in reference to this lawsuit that "I'm not interested in anyone calling for an end to [last-in-first-out teacher layoff rules] who isn't also calling for an end to teacher cuts." Josh Verges, *Minnesota's 2014 teacher of the year loses job amid layoff rules debate*, PIONEER PRESS (April 10, 2017) (quoting Rademacher as further stating that "[e]ach one of the teachers cut from my building, from every building, for budget reasons, is a problem. In other words: ***The order that we cut teachers is way less of an issue to me than the fact we are cutting so many teachers***.") (emphasis added).

significant positive effect on student performance in the lowest-spending districts as measured in state tests."); Phuong Nguyen-Hoang, et al., *Education Finance Reform, Local Behavior, and Student Performance in Massachusetts*, J. OF ED. FINANCE 297 (2014) (concluding that student performance, as measured by test scores, was boosted significantly both by the increase in the aid budget and by the formula revisions that shifted aid toward high need districts); *see also See* Bruce D. Baker, *Does Money Matter In Education?*, ALBERT SHAKER INSTITUTE 1 (2016) ("On average, aggregate measures of per-pupil spending are positively associated with improved or higher student outcomes.").

CONCLUSION

For all the foregoing reasons, *amici curiae* Centro de Trabajadores Unidos en Lucha, ISAIAH, and TakeAction Minnesota support Respondent State of Minnesota's request that the Court affirm the district court's decision granting Respondent's Motion to Dismiss and dismissing Appellants' Amended Complaint in its entirety and with prejudice.

Dated: May 1, 2017

Respectfully submitted,

MILLER O'BRIEN JENSEN, P.A.

/s/Timothy J. Louris
Timothy J. Louris (# 391244)
Canadian Pacific Plaza
120 South Sixth Street, Suite 2400
Minneapolis, MN 55402
PHONE: (612) 333-5831
FAX: (612) 342-2613
EMAIL: tlouris@mojlaw.com

Attorney for Amici Curiae
Centro de Trabajadores Unidos Unidos en Lucha, TakeAction Minnesota, and ISAIAH

CERTIFICATE OF COMPLIANCE

Pursuant to Minnesota Rule of Appellate Procedure 132.01, Subd. 3, the undersigned set the type of this *Amici Curiae* brief in Times New Roman, a proportional 13-point font, on 8 1/2 by 11 inch paper with written matter not exceeding 6 1/2 by 9 1/2 inches. The resulting *Amicus Curiae* Brief contains 5,490 words, as determined by the word-processing software, Microsoft 2010, used to prepare the brief.

Dated: May 1, 2017

MILLER O'BRIEN JENSEN, P.A.

/s/Timothy J. Louris
Timothy J. Louris